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OF THE STATE OF CALIFORNIA

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THE PRISON POLICY INITIATIVE, INC.
REPLY COMMENTS ON THE ORDER INSTITUTING RULEMAKING TO CONSIDER REGULATING TELECOMMUNICATIONS SERVICES USED BY INCARCERATED PEOPLE

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Pursuant to section 3.4 of the Commission's Order Instituting Rulemaking, entered on October 19, 2020 (the "OIR"), the Prison Policy Initiative, Inc. ("PPI") submits the following reply to the opening comments filed in the above-captioned proceeding.

I. The Opening Comments Demonstrate the Need for the Commission to Act

Twelve parties filed substantive opening comments in response to the OIR. Of these parties, eight are organizations or public agencies advocating for the rights of ratepayers, incarcerated people, and their families;[1] two are smaller inmate communications service ("ICS") carriers who support or are neutral to potential action by the Commission;[2] and two are dominant ICS carriers who oppose meaningful regulation.[3] In addition to substantive comments, three telecommunications companies filed statements simply noting that they were taking no position at this stage of the proceeding.[4]

[1] Comments of the Pub. Advocates Ofc. (Nov. 9, 2020); Comments of Californians for Jail & Prison Phone Justice Coalition (Nov. 9, 2020). Comments of the Ctr. for Accessible Tech. (Nov. 9, 2020); Comments of Greenlining Institute (Nov. 9, 2020); Comments of Media Alliance (Nov. 9, 2020); Comments of Prison Policy Initiative (Nov. 9, 2020); Comments of Root & Rebound (Nov. 9, 2020); Comments of the Utility Reform Network (Nov. 9, 2020).

[2] Comments of Network Commc'ns Int'l d/b/a NCIC Inmate Communications (Nov. 3, 2020); Comments of Inmate Calling Solutions, LLC d/b/a ICSolutions (Nov. 9, 2020)

[3] Comments of Global Tel*Link Corp. (Nov. 9, 2020); Comments of Securus Technologies (Nov. 9, 2020).

[4] Comments of Comcast Phone of Cal. (Nov. 9, 2020); Comments of Charter Fiberlink CA-CCO, LLC, et al. (Nov. 9, 2020); Comments of Cox Calif. Telcom, LLC (Nov. 9, 2020).

A. The Parties That Represent the Public Interest Unanimously Support Regulatory Action by the Commission

Non-industry affiliated commenters have provided a thorough record documenting the hardships caused by high ICS rates. The resulting picture illustrates the compelling need for regulatory action by the Commission. Based on the record assembled thus far, PPI encourages the Commission to examine relevant evidence and take all necessary actions to lower intrastate ICS rates.

In addition to the proposals contained in Prison Policy Initiative's opening comments, we also support several innovative suggestions by other commenters. Specifically, we support proposals to promulgate enforceable service quality standards for the ICS industry,[5] review and police carrier privacy practices,[6] and study the feasibility of competition within facilities.[7]

B. The Positions of Industry Commenters Illustrate the Extent of Market Consolidation

Four ICS companies submitted opening comments. The companies' respective positions illustrate the highly concentrated nature of the industry and the resulting market dynamics. Securus Technologies, LLC ("Securus") submitted brief comments addressing a highly selective subset of issues. Global Tel*Link Corporation ("GTL") submitted lengthier comments with more detailed argument, but no admissible evidence. Securus and GTL (collectively, the "Dominant Carriers") have staked a position opposing regulatory action, most likely because these two companies appear to control around three-quarters of the ICS market in the United States. In 2017, the U.S. Court of Appeals noted that three companies (GTL, Securus, and Telmate) controlled 85% of the market as measured by revenue.[8] Months after the court made

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[5] Pub. Advocates Ofc. Cmts at 7; Calif. for Jail & Prison Phone Justice Coal. Cmts at 8; Util. Reform Network Cmts at 16.

[6] Pub. Advocates Ofc. Cmts at 20-21; Ctr. for Accessible Tech. Cmts at 8.

[7] Ctr. for Accessible Tech. Cmts at 7.

[8] *Global Tel*Link v. FCC*, 866 F.3d 397, 404 (D.C. Cir. 2017) (the court refers to "three specialized ICS firms," citing to ¶ 76 of the FCC's Second Report & Order, which identifies the three companies as GTL, Securus, and Telmate).

this observation, GTL acquired Telmate.[9] PPI's own research indicates that the Dominant Carriers control roughly 61-75% of the market measured by incarcerated population.[10]

No matter how one measures market concentration, the inevitable conclusion is that the ICS market is dominated by two firms. GTL claims (without corroborating evidence) that there is "vigorous competition" for facility contracts,[11] but the size of the Dominant Carriers casts doubt on the validity of this claim. Even though there are other companies in the ICS market, the Dominant Carriers' size, access to capital, and patent portfolios allow these two companies to erect significant barriers to entry while offering generous consideration to facilities (in the form of site commissions or other compensation[12]). This dynamic is reinforced by the comments of ICSolutions (supportive of Commission action and neutral on rate caps) and NCIC (supportive of rate caps). While PPI does not know precisely what motivates ICSolutions and NCIC, a fair inference is that smaller carriers are able to compete more effectively in a regulated market that reins in rent-seeking by dominant firms and encourages actual competition from new entrants.

C. The Opening Comments Provide Useful Information Regarding ICS Rates, But No Meaningful Evidence of Carrier Costs

PPI has provided the most comprehensive data regarding intrastate ICS rates in California.[13] The information contained in the Fenster Declaration was generally corroborated by other public-interest commenters.[14] For their part, the Dominant Carriers make vague claims of security-related costs, but the Commission must give discounted weight to these allegations for two reasons. First, the Dominant Carriers make many generalized allegations regarding their operating costs, but provide no verified evidence. Under the Commission's rules, the carriers'

[9] *See* Peter Wagner, "Prison phone giant GTL gets bigger, again" (PPI blog, Aug. 28, 2017).
[10] *Id.* (supporting data is available as Exhibit D to *In the Matter of the Joint Application of TKC Holdings & Securus Tech.*, WC Dkt. No. 18-193, Reply of the Wright Petitioners et al. to Joint Opposition to Petition to Deny (Jul. 30, 2018)).
[11] GTL Cmts at 6.
[12] For a discussion of non-site-commission forms of consideration, *see In the Matter of Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Letter from Peter Wagner to Marlene Dortch (Aug. 1, 2013); *see also* Calif. for Jail & Prison Phone Justice Coal. Cmts at 6-7.
[13] Declaration of Andrea L. Fenster, attached to PPI Cmts (Nov. 9, 2020).
[14] *See e.g.,* Root & Rebound Cmts at 5-6.

unverified allegations must be given "only the weight of argument."[15] Second, the Dominant Carriers' unspecific and uncorroborated claims of security-related costs resemble a 2015 campaign by county sheriffs to deter the FCC from capping rates by citing unsubstantiated security claims.[16] As PPI noted in response to that campaign, we do not deny that security features contribute to the cost of ICS calls, but citations to those features are not salient to rate-setting proceedings unless the commenter provides: (1) evidence showing that the security features in question are reasonably and directly related to the provision of ICS, and (2) actual verifiable quantification of the cost of such features. Because the Dominant Carriers have failed to come forward with meaningful evidence, their arguments regarding costs should be given little weight by the Commission.

II. The Record is Sufficient to Establish the Commission's Jurisdiction over Voice and Video Calling

Several commenters addressed matters of jurisdiction, encouraging the Commission to exercise its authority over the ICS industry. Unsurprisingly, the Dominant Carriers advance an overly-narrow reading the Commission's jurisdiction—a reading that exclusively serves the economic interests of Securus and GTL. The Commission should carefully analyze the spectrum of applicable laws and policies (both state and federal), and not be led astray by irrelevancies.

A. There is No Real Dispute over the Commission's Jurisdiction Related to Voice Calling

No one appears to deny the Commission's power to regulate voice calling. The only argument against such regulation comes from GTL, which spills considerable ink contending that the Commission should tread lightly and rely on market competition in lieu of price regulation.[17] Yet GTL does not contest the Commission's jurisdiction over voice calling (nor

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[15] PUC Rule of Practice & Procedure 6.2.

[16] For details of the sheriffs' campaign and PPI's response, *see In the Matter of Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Letter from Stephen Raher & Aleks Kajstura to Marlene Dortch (Jan. 27, 2015). As noted in Exhibit 2 to the Raher & Kajstura letter, Securus alleged at the time that the campaign was orchestrated by "another ICS provider." PPI is unable to confirm or disconfirm that allegation.

[17] GTL Cmts at 3-7.

could it reasonably do so).[18] Rather, GTL makes a normative assertion that regulation is bad. This position is unpersuasive in light of comments explaining the documented market failure and lack of consumer-protective competition in the ICS market.[19]

B. The Commission Has Jurisdiction over ICS Video Calling

The Dominant Carriers' most vigorous opposition is reserved for the proposed regulation of video calling. GTL, in particular, throws many arguments at the proverbial wall, but a close reading of applicable authorities shows that the Commission has the power to regulate video calling rates. The jurisdictional analysis consists of two steps: (1) does state law allow the Commission to regulate video calling, and (2) if so, does federal law preempt the Commission's exercise of its powers? As explained below, PPI believes that the answers to both questions favor the Commission's ability to regulate ICS video calling.

1. The Public Utilities Act Vests the Commission with the Necessary Power to Regulate ICS Video Calling

California's constitution and utilities statute provide the Commission with the authority to act with regards to video communications. Although California law does not explicitly address video calling, a fair and reasonable reading of relevant statutes and case law reveals that jurisdiction exists. Due to the rapid evolution of telecommunications technology, the Commission should focus on protecting telecommunications customers, rather than accepting the Dominant Carriers' invitation to wrap itself around the axle of differentiating between ever-changing technologies.[20] Incarcerated callers and their families cannot chose which technology

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[18] GTL cannot reasonably deny the Commission's jurisdiction, given that it operates in California under a certificate of public convenience and necessity issued by the Commission itself. *See* GTL Cmts at 1.

[19] Ctr. for Accessible Tech. Cmts at 4; Media Alliance Cmts at 5; PPI Cmts at 3; Utility Reform Network Cmts at 4-7.

[20] Notably, federal ICS rules define ICS as "a service that allows Inmates to make calls to individuals outside the Correctional Facility where the Inmate is being held, *regardless of the technology used to deliver the service.*" 47 C.F.R. § 64.6000(j) (emphasis added). GTL notes that the D.C. Circuit vacated the FCC's video-calling data collection rules (GTL Cmts at 15, n.41); however, this ruling was not a definitive determination of the FCC's jurisdiction, but rather a finding that the FCC had not established a sufficient record. *See GTL v. FCC*, 866 F.3d 397, 415 (D.C. Cir. 2017) ("Before it may assert its jurisdiction [over video calling] . . . the Commission must first explain how its statutory authority extends to video visitation services as a 'communication[] by wire or radio' . . . or as an 'inmate telephone

to use—all available telecommunications channels are offered on a take-it-or-leave it basis pursuant to bundled contracts negotiated by two parties, neither of whom represent the interests of the consumer. Turning to California law, the Commission has the power to regulate ICS video calling for three reasons.

First, the statutory definition of telephone service is flexible enough to encompass ICS video calling. As noted in the OIR, the Commission has jurisdiction over "telephone corporations" which are defined as entities owning certain enumerated facilities "owned, controlled, operated, or managed in connection with or to facilitate communication by telephone."[21] The term "telephone" is not defined in statute, but California courts have defined "telephone or telephony" to "include[] the entire art of speech transmission with the many accessories and operating methods which research, development and invention have supplied to facilitate and extend conversation at a distance by electrical means."[22] The essence of telephone service is enabling "two-way communication by speaking as well as listening."[23] Statutory and judicial definitions to not *limit* telephone service to voice-only transmission. To the contrary, in 1956 the Supreme Court noted that "pictures of speaker and listener do *not yet* form a part of the [telephone] communication."[24] The court's description of telephone service accurately anticipates the evolution of technology and establishes an expansive definition of telephony that can adapt to future developments.

Second, ICS carriers are clearly telephone corporations, and any public service they provide is therefore subject to the Commission's regulatory power. California statute provides that "Whenever any . . . telephone corporation . . . performs a service for . . . the public or any portion thereof for which any compensation or payment whatsoever is received, that . . .

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service.'"). The problem noted by the court is easily avoidable here: the California Public Utilities Commission can and should establish its jurisdiction first, before regulating video calling rates.

[21] OIR at 2 (quoting Cal. Pub. Util. Code § 233).

[22] *Commercial Comm'cns v. Pub. Utils. Comm'n*, 50 Cal. 2d 512, 519 (1958).

[23] *Id.*

[24] *Television Transmission, Inc. v. Pub. Utils. Comm'n*, 47 Cal. 2d 82, 88 (1956) (emphasis added).

telephone corporation . . . is a public utility subject to the jurisdiction, control, and regulation of the Commission."[25] The test for determining whether a company has dedicated its property to public use is "whether or not [a person has] held himself out, expressly or impliedly, as engaged in the business of supplying [a service or commodity] to the public as a class, not necessarily to all of the public, but to any limited portion of it, such portion, for example, as could be served by his system."[26] Video calling easily meets this test. Provided that they comply with the carrier's rules and terms of service, any member of the public may avail themselves of the communications services offered by ICS companies. That video calling is technologically different from voice telephony is not determinative of jurisdiction. For example, the Commission does not have the general authority to regulate book publishers; but it is able to regulate publishing activities by local telephone exchange carriers when those carriers use their market power to "make a considerable profit" from publishing telephone directories.[27] PPI is asking the Commission to do what the Supreme Court endorsed in *California Fireproof Storage*: consider the total telecommunications revenue collected by ICS carriers and regulate public service rates accordingly.

Finally, in defining the boundaries of its jurisdiction, the Commission may determine the legislature's intent by reference to other telecommunications statutes, including those enacted and repealed more recently.[28] The recent sunset of California's statutory prohibition of voice

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[25] Cal. Pub. Util. Code § 216(b).

[26] *Independent Energy Producers Ass'n v. State Bd. of Equalization*, 125 Cal. App. 4th 425, 442-443 (4th Dist. 2004) (*quoting Van Hoosear v. Railroad Comm'n*, 184 Cal. 553, 554 (1920) (internal quotation marks omitted; alterations by Court of Appeals)).

[27] *Cal. Fireproof Storage Co. v. Brundige*, 199 Cal. 185, 189-190 (1926) ("The telephone service . . . is . . . a natural monopoly; and, this being so, it is, in an especial sense, the proper subject of public regulation and control. If in the employment of one of its essential instrumentalities it undertakes to so manipulate its form and use as to make a considerable profit out of that portion of the public which it is thus enabled to serve, we are of the opinion that such profit should be taken into account of by the regulating body as are the other earnings of this public utility in determining what just and reasonable rates should be allowed and paid by the public for the service it provides.").

[28] *Old Homestead Bakery v. Marsh*, 75 Cal. App. 247, 258-259 (3d Dist. 1925) (When construing a statute, "it is proper to consider, not only acts passed at the same session of the Legislature, but also acts passed at prior and subsequent sessions, and even those which have been repealed.").

over internet protocol ("VoIP") regulation is informative.[29] Public Utility Code § 710 (enacted in 2012 as Senate Bill 1611) prohibited the Commission from exercising regulatory jurisdiction over VoIP enabled services (with certain enumerated exceptions). That statute contained an automatic repeal clause, sunsetting the restriction on January 1, 2020.[30] The very fact that the legislature enacted Senate Bill 1611 suggests legislative acknowledgment of the Commission's jurisdiction over VoIP services; otherwise, the entire bill would be surplusage.[31] Now that § 710 has sunset, the Commission may regulate VoIP when it determines that current rates or practices in a specific market are unjust or unreasonable. Such is the case with ICS video calling.

The Dominant Carriers' arguments against Commission action blur the distinction between California's history of regulatory forbearance and a lack of jurisdiction. Securus, for example, stresses that the Commission has disclaimed jurisdiction over apps like Skype and FaceTime.[32] But this approach ignores at least two fundamental differences between these types of apps and ICS video calling. First, services like Skype, WhatsApp, and FaceTime exist in a competitive marketplace where consumers can chose from numerous technologies and services to meet their communications needs. In contrast, ICS video calling represents the only way for families to maintain remote visual contact with incarcerated relatives. The second difference is evidenced in the 2019 legislative position paper that Securus cites in its comments.[33] That memorandum states that "the state simply has no interest" in regulating non-interconnected VoIP services like Skype because such services "do not have the same public obligation [as providers of interconnected VoIP services] to serve and protect consumers, to ensure public safety, or contribute to universal service objectives."[34] In contrast, ICS video service providers do provide

[29] *See also* Media Alliance Cmts at 8.
[30] Cal. Pub. Util. Code § 710(h).
[31] *See Alameda County Deputy Sheriff's Ass'n v. Alameda County Employees' Retirement Ass'n*, 9 Cal. 5th 1032, 1096, n.31 (2020) ("[A]n interpretation of statutory language that renders the language useless is, of course, disfavored.").
[32] Securus Cmts at 7.
[33] *Id.* at 6, n.12 (citing Memorandum from Hazel Miranda to Cal. Pub. Utils. Comm'n (Jun. 24, 2019)).
[34] Miranda Memorandum at 4.

critical connections and serve a public safety role, as evidenced by the Dominant Carriers' characterization of their offerings.[35] In brief, California has never regulated non-correctional VoIP video services because the state has chosen to rely on competition as a form of policing against unreasonable and unjust business practices. In the fundamentally different ICS market, competition cannot save the day and the Commission should act.

2. Federal Law Does Not Impede the Commission's Jurisdiction over Video Calling

GTL argues that "there is no lawful basis for the promulgation of [video calling] rate caps" because of "the Commission's sharply limited jurisdiction and control over Voice-over-Internet Protocol and Internet Protocol enabled services, along with the classification of video conferencing service as an advanced communications service and an information service under the Communications Act of 1934."[36] At first glance, this statement may appear to be an argument in favor of federal preemption; but, a close reading of applicable authorities reveals no preemption obstacles to Commission regulation of ICS video calling.

As a starting point, it is helpful to recall the events that precipitated this proceeding. The FCC's attempt to regulate intrastate ICS rates was struck down when the D.C. Circuit ruled that the FCC lacks jurisdiction over intrastate services. The court's holding rests squarely on the presumption against federal jurisdiction over intrastate communications, as articulated by the Supreme Court in *Louisiana Public Service Commission v. FCC*.[37] As the Supreme Court noted, the "critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law."[38] In the context of video calling, Congress has spoken in clear terms that it *expects* states to play a regulatory role. Thus, far from being preempted, the Commission's powers are buttressed by federal law.

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[35] *See e.g.,* GTL Cmts at 2 ("GTL offers integrated packages of technology on a contractual basis to meet the demands of each of its correctional facility customers, tailored to fit its unique security and public safety needs.").

[36] GTL Cmts at 14.

[37] *Global Tel*Link v. FCC*, 866 F.3d 397, 409 (D.C. Cir. 2017) (*citing Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 373 (1986).

[38] *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 370.

The key evidence of Congressional intent can be found in section 706 of the Telecommunications Act of 1996[39] (codified as 47 U.S.C. § 1302). This statute creates the definition of "advanced telecommunications capability," a category of service that includes "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."[40] Far from preempting state regulation, section 706 expressly envisions a role for states in regulating advanced telecommunications capabilities. Specifically, the statute provides that the FCC "*and* each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment *on a reasonable and timely basis* of advanced telecommunications capability to all Americans . . . by utilizing . . . *price cap regulation*."[41]

GTL also posits, as an aside, that ICS video calling is an information service under 47 U.S.C. § 153(24), but provides no authority for this. PPI is aware of no such ruling by the FCC, and given the general treatment of information services under the Communications Act, the very fact that the FCC proposed regulation of video calling in the Second Report & Order suggests that this technology is not an information service.[42] Other commentators have provided a clear explanation of how advanced ICS communications like video calling can be regulated as communications services under federal law.[43]

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[39] Pub. L. 104-104, 110 Stat. 56 (1996).

[40] 47 U.S.C. § 1302(d)(1). Note that the statutory definition of "advanced telecommunications capability" is distinct from "advanced communications services" referenced in footnote 40 of GTL's comments. It is unclear what relevance advanced communications services have to this proceeding, since this statutory definition (created by the Twenty-First Century Communications & Video Accessibility Act of 2010, Pub. L. 111-260 (Oct. 8, 2010)), would seem to have little applicability here, except perhaps in regards to the Commission's fourth question regarding service for deaf and hard-of-hearing callers.

[41] *Id.* § 1302(a) (emphasis added).

[42] *In the Matter of Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Report and Order and Third Further Notice of Proposed Rulemaking ¶¶ 296-307, 30 FCC Rcd. 12763, 12902-908 (Nov. 5, 2015).

[43] Stephen Raher, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 Hastings Race & Poverty L.J. 3, 52-53 (2020).

Through citational sleight of hand, GTL invites the Commission to cede its regulatory jurisdiction. Because GTL's argument is unsupported by federal law, the Commission should decline this invitation and undertake a rulemaking regarding ICS video calling.

III. Conclusion

The record shows that the Commission should act to protect California consumers, and should take such action quickly. The only opposition to rate regulation comes from the Dominant Carriers who do not want to lose the rich stream of revenue they can command from intrastate calls. Commenters representing the public interest, as well as non-dominant ICS carriers, support Commission action. The Prison Policy Initiative joins with the broad movement of individuals and organizations calling for California rate justice, and urges the Commission to proceed with rate caps and other pro-consumer reforms.

Dated: November 19, 2020

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